

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

November 19, 2009

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

STATEWIDE

Re-Submittal Authorization to Enter Into a Memorandum of Agreement Between the Department of Land and Natural Resources and the Department of Agriculture on Behalf of the Aquaculture Development Program

APPLICANT:

Department of Land and Natural Resources on behalf of the Land Division

Department of Agriculture on Behalf of the Aquaculture Development Program

LEGAL REFERENCE:

Sections 171-6, Hawaii Revised Statutes, as amended.

BACKGROUND:

Article XI of the Constitution of the State of Hawaii relating to the conservation, control, and development of resources, provides in section 6 that the State shall have the power to manage and control the marine, seabed, and other resources located within the boundaries of the State, including its archipelagic waters, and reserves to the State all such rights outside state boundaries not specifically limited by federal or international law.

In 1986, the State Legislature created the Ocean and Submerged Lands Leasing Act, chapter 190D, HRS. Global development of open ocean aquaculture technology had evolved rapidly and commercial systems were readily available for use in both nearshore and offshore applications. Open Ocean aquaculture was being carried out successfully, profitably and sustainably in many areas of the world, including Scandinavia, South America, Asia and the United States. For example, offshore culture technologies were being used for: salmon in Norway, Chile and the United States; pearl oysters in several South Pacific island countries; bluefin tuna in Australia; and several seaweeds in Japan. However, in Hawaii no commercial aquaculture lease had been granted under this statute due to severe restrictions in the law that limited the type and scale of activities to research. Here in Hawaii, interest in moving

aquaculture offshore had been growing as new, high value marine species, such as moi, became available from hatchery research and cage technology that can be purchased "off the shelf." This increasing interest prompted DLNR, administrator of state aquatic resources and submerged lands, and DOA, lead agency for aquaculture development, to re-examine Chapter 190D, HRS to remove key impediments and make the law more "user friendly." As a result, DOA in cooperation with DLNR, prepared and submitted Administration bills (S.B. No. 1321 and H.B. No. 984) to the 1999 Legislature to amend the ocean leasing law.

In 1999, the State Legislature took a far reaching step by passing S.B. No. 1321, S.D. 2, H.D. 2, C.D. 1, that allows potential utilization of marine resources for research and development of open ocean aquaculture. Former Governor Benjamin Cayetano on July 1, 1999 signed the bill into law as Act 176, Session Laws of Hawaii 1999.

The amendments to Chapter 190D, HRS, were as follows:

- a) clarify that mariculture is a sub-category of aquaculture that occurs in the marine environment;
- b) allow commercial mariculture as an allowable use under Chapter 190D, HRS;
- c) remove size restrictions on mariculture leases;
- d) define the water surface, water column and submerged lands beneath them as one economic unit for purposes of this chapter and calculating lease rent;
- e) subject to the Office of Hawaii Affairs' 20% entitlement, deposit revenues from leases into the Special Land and Development fund for purposes of aquaculture planning, research and development;
- f) allow processing of ocean leases under Chapter 190D, HRS without prior authorization of the Legislature by concurrent resolution;
- g) strengthen the law by requiring Conservation District Use Applications (CDUA) for ocean space to describe existing users of the proposed site;
- h) strengthen the law by having each lease describe the degree of exclusive use or access to the site by the public allowed;
- i) require that these amendments made to Chapter 190D, HRS, be repealed five years after the effective date of the Act, unless the Legislature authorizes an extension; and
- j) report each year to the legislature on progress made in implementing the law.

The first ocean lease to be issued was to Cates International, Inc. located about 1 mile off Ewa Beach, Oahu. The lease covered 4 cages suspended 40 feet below the ocean surface. The cages are stocked with juvenile fish (finfish aka moi) grown in tanks on land supplied by a hatchery. Their staff conducts daily maintenance, safety inspection of the cages and mooring system, environmental data

collection and feeding operations.

Essentially, DOA/ADP is the State aquaculture lead agency. Facilitator and liaison between companies interested in obtaining ocean leases and the regulatory agencies. DOA/ADP assists companies in completing and packaging applications and holding initial Scoping Meetings. DLNR/OCCL/LD is the State agency responsible for determining environmentally acceptable resource uses via the CDUP process. DLNR/OCCL/LD issues and manages the long-term ocean leases.

DISCUSSION:

Currently, Land Division manages two (2) ocean leases on behalf of DOA/ADP. Revenues generated go directly into the Special Land and Development Fund (SLDF). Land Division recently transferred approximately \$130,000 to DOA/ADP that was attributable to the lease rents collected under the existing ocean leases for the period between 2001 and 2010.

Recently staff met with ADP staff to discuss either (1) the leases should be transferred by Executive Order to ADP or (2) the 2 agencies entering into an agreement, compensating Land Division for managing current and future ocean leases.

Since ADP is a small agency, facing current and future budget cuts, it was decided the best mechanism would be Option #2.

The Attorney General's office has assisted us by conducting a preliminary review of the Memorandum of Agreement (Exhibit A). It is a draft and will be subject to further changes by either ADP staff, DOA's Deputy Attorney General or the Board of Agriculture. Therefore, we are recommending authority be granted to Chairperson to help us negotiate and finalize the Memorandum of Agreement.

Recently, the Land Board at its meeting of October 23, 2009, under agenda D-11, approved staff's recommendation to have this item (request) withdrawn. There were questions from the Attorney General's office that needed to be resolved by staff. Questions such as: why we are agreeing to accept only a fraction of the lease rents from leases under the DLNR and why are we agreeing to pay the remainder of the lease rents to DOA/ADP? What is the authorization for being able to do this? Under Chapter 190D the rent money from these leases are to be paid to the special land and development fund. HRS 171-19 (Special Land and Development Fund) contains no provisions that allows DLNR to turn over all of the rent money, minus a management fee, to the DOA or ADP. We do not see any legal authority for the arrangement being proposed or for the prior arrangement of DOA/ADP receiving 100% of the rental income from these properties.

The mechanisms for funding the Aquaculture Development Program should have undergone housekeeping adjustments long ago to prevent ambiguity and confusion that we are now facing. Arguably there is statutory authority for directing the lease revenues generated under Chapter 190D-33 for aquaculture operations to the ADP program and its special fund under Chapter 141-2.7 and justifying the administrative fee DLNR/LD now wishes to assess DOA/ADP. While clearly not the cleanest of statutory authority provisions to rely upon, they can be read together to mean that DLNR/LD can move Chapter 190D revenues from the SLDF to the Aquaculture Development Special Fund. The highlighted portion of Section 141-2.7(b) can be used to justify using a portion of those funds to pay for the administrative fees associated with subcontracting the services of DLNR/LD to manage the revenue collection functions for the ADP. ADP is currently incapable of handling those tasks because it lacks the requisite infrastructure and personnel (they are down to 2 people).

§190D-33 Revenues. The revenues obtained from the leasing of state marine waters pursuant to this chapter shall be deposited into the special land and development fund to be used for planning, research, and development of the aquaculture industry.

§141-2.7 Aquaculture development special fund. (a) There is established in the state treasury the aquaculture development special fund into which shall be deposited . . . (4) Moneys directed to the aquaculture development program from any other sources . . . (b) Moneys in the aquaculture development special fund shall be used to . . . [s]upport research and development programs and activities relating to the expansion of the state aquaculture industry.

A long-term solution is the need for statutory changes to Chapter 190 and Chapter 141 which staff has already started discussing with ADP for the upcoming Legislative Session.

RECOMMENDATION: That the Board:

1. The Memorandum of Agreement is subject to Board of Agriculture approval.
2. Authorize the Memorandum of Agreement Between the Department of Land and Natural Resources and the Department of Agriculture on Behalf of the Aquaculture Development Program, subject to the following:
 - a. Review and approval by the Department of the Attorney General.

3. Authorize the Chairperson to negotiate on behalf of the Department, and execute the Memorandum of Agreement.

Respectfully Submitted,



Charlene E. Unoki
Assistant Administrator

APPROVED FOR SUBMITTAL:



Laura H. Thielen, Chairperson